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Supreme Court, U. S.
FILED
JUL 13 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

KARL KLEVE
CINCINNATI, OHIO
Petitioner
vs

RETAIL CREDIT COMPANY
A GEORGIA CORPORATION
ATLANTA, GEORGIA
Respondent

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT

OF THE UNITED STATES

Case No.

KARL KLEVE
2887 Harrison Ave.
Cincinnati, Ohio, 45211
APPELLANT
vs

RETAIL CREDIT COMPANY
A Georgia Corporation
1600 Peachtree St. NW
Atlanta, Georgia
APPELLEE

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

The Ohio Supreme Court denied jurisdiction in this case.

The Decision, per Curiam, of the Court of Appeals, First Judicial District of Ohio, Affirming the Common Pleas Court Ruling is in Appendix, page

The Ruling by the Court of Common Pleas Hamilton County, Ohio, Dismissing with Prejudice, before Trial, is in Appendix, page

GROUNDS FOR JURISDICTION OF THIS COURT

The decree of the Ohio Supreme Court denying jurisdiction was rendered on 25 February, 1972, and Entered on 7 March, 1972. A Rehearing by said Court was denied on 14 April, 1972.

These denials had the effect of making the Court of Appeals the highest State Court to which this appeal could be taken.

The judgment of said Court of Appeals, First Judicial District of Ohio, in Hamilton County, Ohio, was rendered on 8 November, 1971, entered on 24 November, 1971. A Request for Reconsideration by said Court of Appeals was denied on 20 November, 1971.

The Statutory Provisions believed to confer on this Court jurisdiction of this Appeal are:

28 U S C Sec 1257 (2) & (3).

ARTICLE III, U. S. Constitution.

FIRST AMENDMENT, U. S. Constitution.

RULE 19, 1.(a) & (b) of the current "Rules of the Supreme Court of the United States."

The following questions are presented for review:

Can the Appeals Court (or any court) decide against Appellant for the reason that his Motion for New Trial was not fil-

ed timely, when the Record clearly stated that said Motion was filed timely, and in fact had been specifically found so by the Trial Judge, and said issue of timeliness had never been raised or question-in any way by opponent?

Even though Appeals Court obviously had not read the Record, can it assume that failure of Appellant"to file his New Trial Motion within the time provided by law was a basis for overruling the Motion for New Trial"?

Should Plaintiff-Appellant be totally and finally prevented, by all courts, from ever having his traditional Day-in-Court, a hearing on his merits, for redress of his grievance?

Can the highest Courts sanction the Trial Court's dismissal with prejudice, before trial, because of a delay, completely excused by statute, by Appellant's Counsel, in compliance with a pretrial order concerning procedure?

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE III: "The Judicial power of the United.States shall be invested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judicial power shall extend to all cases, in Law or Equity, arising under this Constitution, the Laws of the United States,. . . to CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES. . . in all cases before mentioned, THE SUPREME COURT SHALL HAVE APPELLATE JURISDICTION both as to law and fact."

Vol Page

ARTICLE VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"

Vol Page

AMENDMENT I:"No person shall be deprived of. . . property without due process of Law". ("A business is a property right" 28 FCA 284.) and "Right to petition for redress of grievances" Vol Page

AMENDMENT XIV:"No state shall make or enforce any law which shall abridge the privileges . . . of citizens of the United States; nor shall any state. . . deny to any person within its jurisdiction the equal protection of its laws".
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STATEMENT of the CASE

In 1963 & 64, Appellee had published untrue reports on the qualifications of Appellant as an Insurance Agent, so derogatory that Appellant was thereafter never able to secure representation of an insurance company, and was thus forced to discontinue his lifelong profession and 80-year-old business. After making every possible effort to have the reports corrected, without success, Appellant filed a Libel Action.

Appellee answered, first, that it had never issued reports on Appellant, then refused to answer whether it had published reports on Appellant, then, that the reports were improperly discovered and hence inadmissable, and, finally, that the reports were true and not libellous.

None of the merits was ever heard; there was no testimony, only the jury selection & opening statements, when Appellee moved for dismissal, on ground that the Appellant had failed to comply with a Court Order. Appellee had asked, just before trial, and the Court had so ordered, that Appellant turn over to Appellee its file on Appellant which had been given Appellant 5 years previously. Alas, 5 years previously, said file had been brought to counsel for Appellee on a Subpoena Duces

fecum, along with a great quantity of all the records of 20 years of business operations, as demanded by Appellee, and whatever papers as had been considered significant by Appellee had already been entered as exhibits; but that was five years before, and a different attorney was handling the case for Appellee, then.

This new order had been given Appellant directly, not to his counsel, and Appellant had complied with it to the letter, in that it had ordered Appellant to deliver possession of all said papers "in his possession", and Plaintiff-Appellant had done exactly that. But, 5 days later, Appellant's counsel brought to Appellee's counsel several papers from said file which the former had found, mingled with his file when they were all subpoenaed together, so many years before.

At this point in the case, Appellant's counsel was involved in an extreme personal crisis, in that his father lay dying of cancer (a lingering death), said father being also an attorney, and in fact the law partner of counsel, so that, beyond the great emotional stress and preoccupation, counsel was hardppressed to maintain the flow of his father's extensive practice as well as his own. Now, even if it is fair, under the law, to so severely punish a plaintiff for negligence on the part of only his attorney, as to deprive him of his precious, American right to a trial on the merits, in the case on which his whole career depends, the law still provides amply for continuances and extensions for personal hardship.

The Court dismissed the case forthwith, on 24 Nov 70, without prejudice, but after being questioned by Counsel for Appellee, he was handed a note by his constable, and he changed his decision to dismissal with prejudice.

Motion for New Trial was filed, set for hearing, but overruled before the hearing took place.

Appeal was filed, but though Brief and Assignment of Error sought review of the Dismissal with Prejudice, Appeals Court, in its Decision,

did not pass on said Dismissal, but affirmed the overruling of the Motion for New Trial, on the assumption that the Trial Court had found said Motion untimely, although this issue had never been raised nor questioned in any way by either party in either Court, and, in fact, the Trial Court had signed the statement, on 28 June71, included as last page of the Record, that "WITHIN THE TIME PROVIDED BY LAW, PLAINTIFF FILED IN WRITING MOTION FOR NEW TRIAL . . . "

In its Decision of Affirmance, the Court of Appeals stated:

"The Trial Court did not give any reason for its action in overruling the motion for new trial. It must be considered that the failure of the appellant to filw the motion within the time provided by law was a basis for overruling the motion.

"For the reasons given, alleged errors presented in paragraphs 6 & 8 have no merit. Coming on to consider the alleged errors presented in paragraphs numbered 1,2,3,4,5,7,9, 10,11 & 12 (of the Brief and Assignment of Error) in relation to the action of the Trial Court in granting the motion to dismiss, this Court finds there is no merit to those alleged errors for the same reasons given in determining the alleged errors in paragraphs 6 & 8.

"It is therefore ordered by the Court that the judgment of the Court of Common Pleas, Hamilton County, Ohio, be, and the same hereby is confirmed." (End of quotation)

All 12 said paragraphs of Appellant's Brief did deal with various aspects of the Dismissal with Prejudice, except paragraph 8, which referred only to the fact that though the Trial Court had set a hearing on the Motion for New Trial, it had then overruled said Motion before said hearing.

Appellant then appealed to Ohio Supreme Court, submitting these propositions in his "Memorandum in Support of Jurisdiction":

Appeals Court had decided against Appel-

lant on an assumption not supported by the Record and, in fact, clearly contradicted in said Record.

Appeals Court had decided on an issue never plead to it and not contained in the evidence.

Appeals Court had sanctioned dismissal by Trial Court with prejudice which it did not have the power to do under the circumstances.

Thus, Appellant, to this date, has been completely denied his Day-in-Court, so cherished in all legal tradition, for redress of the libels which took from him his life's professional career and livelihood.

The Ohio Supreme Court refused to hear the case.

ARGUMENT

The disposal of this case in Appeals and Common Pleas Courts was so irregular, so far from accepted and usual course of judicial procedings, that it is difficult to find any precedent or statutes applicable to such procedures.

But no case law need be cited to support such a basic notion that a Court, of last resort, especially, owes an Appellant the duty to at least read the Record, if nothing else, before making its decision.

A decision based entirely on an assumption, one directly contradicted in the Record and the statement of the Trial Judge, is wrong.

The Supreme Court of Ohio gave its opinion, in case No 41118, 24 Jan 68, in BAZELL vs CITY of CINCINNATI, 42 O Op2d 137:

"It is particularly dangerous for a Court of last resort to pass upon a claimed error of law, which has not been pointed out to it and briefed by any party, especially where an important question of law is involved - unless such claimed error has been pointed out by a party and argued by brief, an opposing party has no opportunity

to answer the argument or demonstrate that it is without merit. If this Court does not disregard such an error, it runs the unnecessary risk of making an erroneous determination . . . which cannot be corrected on any appeal from its judgment".

This opinion cites Sec 2505.21, Ohio Revised Code:"Errors not specifically pointed out in the Record and separately argued by brief may be disregarded".

This assumed error, in instant case, was not only not pointed out in the Record, but said Record definitely pointed out that there was no such error.

The Ohio Supreme Court, in hearing said Bazell v Cincinnati, and denying hearing of instant case of this Appellant, denied this Appellant the equal protection of the Ohio laws.

"No state shall. . . deny to any person within its jurisdiction the equal protection of its laws" ARTICLE IV, Sec 2, U. S. CONSTITUTION.

Also, "The Courts will not go beyond the issue raised, and decide momentous questions not contained within the framework of the pleadings and the evidence". KOREMATSU v U. S., 323 US 214.

For the Court to dismiss with prejudice for a non-existent violation of a pretrial order, without allowing Appellant to defend against the charge, and without having heard a shred of the merits of Appellant's case, is beyond the power of any Judge; in this case it deprived Appellant of the valuable right to due process of the law. Never in the history of Ohio has a Court had the power to dismiss with prejudice in such a situation.

In FULTON v FULTON, 163 N E 2d 194, an Ohio Court of Appeals, 1958, stated:

"The court was well within its rights in dismissing the action for failure to com-

ply with the order concerning the proceedings. However, it is to be noted that the action was dismissed with prejudice, and the law gives a court the right to dismiss the action ONLY WITHOUT PREJUDICE to another action."

CASES IN SUPPORT OF JURISDICTION

USC 28 Sec 1257(3) "Final judgments. . . rendered by the highest court of a state in which a decision could be had, may be reviewed by the U. S. Supreme Court . . . by writ of Certiorari, where any . . . right, privilege is set up or claimed under the Constitution."

MORRIS v ALABAMA 294 US 587:"The Supreme Court will review the finding of facts by a state court where a federal right has been denied as a result of a finding shown by the Record to be without evidence to support it".

CURTIS v BUTTS 388 US 130,155:"Libel action of the present kind cannot be left entirely to the state libel laws, unlimited by any overriding constitutional safeguard".

BACON v TEXAS 163 US 207:"A judgment of an inferior court could be reviewed where appeal to the highest court of the state had been denied."

U. S. v RICHMOND 177 F Supp 504:"The Supreme Court of the U. S. has the authority under this section to review eithe r by appeal or on writ of Certiorari, final judgments of lower state courts where relatively higher state courts have . . declined to review their judgments. . "

TUCKER v TEXAS 326 US 517:"Where a case involving a federal constitutional right could not be taken to a higher state court, it could be taken directly to the U. S. Supreme Court."

RULES OF THE SUPREME COURT of the UNITED STATES, Rule 19:"1.A review on writ of certiorari . . . will be granted only where there special and important reasons therefor . . (such as) (a)Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court. (b)Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision "

PROOF OF SERVICE

I, Karl Kleve, say that all parties required to be served have been served copies of the foregoing petition to the U. S. Supreme Court, by depositing copies hereof in a U. S. Post Office Mailbox, with First Class Postage prepaid, addressed to James R. Adams, counsel of record for Appellee, at 2900 DuBois Tower, Cincinnati, Ohio, 45202, on 5 June, 1972.

Be it known that Karl Kleve, deponent herein, personally appeared before me, a
in and for
and declared under oath that the above statement is true.

Respectfully submitted, _____

APPENDIX

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

KARL KLEVE :
Plaintiff : No A 208313
vs :
RETAIL CREDIT COMPANY
Defendant : Nov 23, 1970

BEFORE:
Bettman, J.

APPEARANCES:
Mr. Stanley Goodman and Mr. William Flax, Counsel for Plaintiff
Mr. James Adams, Counsel for Defendant

Mildred K. Schnelle
Court Reporter

EXHIBIT "A"

RULING OF THE COURT

THE COURT: I think the documents produced this morning, copies thereof and the copy of the deposition of Mr. Kleve, ought to be marked and submitted as exhibits in connection with this motion, because the Court can't really proceed solely on the statements of counsel.

(Documents referred to were marked Exhibits Nos 2 & 3 for identification.)

Rule No. 41 (B) permits the Court to grant an involuntary dismissal and, as I read the cases, the question of whether the dismissal will be with or without prejudice is vested in the sound discretion of the Court.

That discretion should, indeed, not be whimsical or done out of pique, but, as Mr.Goodman points out, done only under circumstances which would be considered extreme because it amounts to, of course, depriving the litigant of his opportunity to litigate the case on its merits.

It is the Court's conclusion that the motion should be granted, and the case

should be dismissed without (sic) prejudice, for failure of the plaintiff to comply with the Court's order of November 18 to turn over, by noon on the 19th, to counsel for the defendants, all documents and all papers in the file which were the property of the defendant Retail Credit Company.

The reason the Court feels that this is a case which justifies such an extreme decision is because the evidence of what went on at the deposition, the evidence which has been brought before the Court, indicates that what the plaintiff has been doing, in effect, is obstructing justice and committing a fraud on this court.

This is not an equity case, it is true, but the doctrine that a person comes into court with clean hands is equally applicable in any case.

In the particular case that we have here, the fact that the plaintiff removed the file of the defendant and retained possession of it over the intervening five or so years effectively, in the Court's judgment, deprived the defendant of his opportunity to defend himself.

This is the type of case in which the defendant's records are his sole source of documents to refresh his recollection, find out who the appropriate witnesses are in order to present a case, so that, at this point, a dismissal without prejudice would be, in fact, a dismissal to the prejudice of the defendant.

The record should show that on November 18, in the Court's chambers, at a duly called pre-trial conference, the Court inquired of the plaintiff who was there present with counsel whether he, in fact, had the file of the defendant and he then answered "Yes." And parts of

that file were produced, apparently, on Thursday, and parts on Saturday, and apparently part at this stage in the proceedings, this morning.

It is no excuse that the file, that these particular papers, happened to be in the files, at that point, of counsel. Plaintiff was the person who removed them; plaintiff was the person who had the responsibility of knowing where they were. It is not counsel's fault not to know where these documents were. It is the fault of the plaintiff himself who comes into this Court asking for justice.

The kind of cat and mouse game that apparently went on at the deposition where he said he brought all reports -- the old negative pregnant statement which is not an exact lie but the implications of it are untrue- -is typical of what, apparently, has gone on in this case.

This is not a case of the defendant failing to use its own energies to discover information which the plaintiff had. This is a case of the defendant trying to find out, and get back from plaintiff, its own papers which plaintiff by one way or another has avoided doing up until this time.

I see no basis -- in fact I think it would be a defiance of the inscriptions on the wall of the Courthouse -- to permit the plaintiff to go on with this matter, and the motion to dismiss will be granted.

MR. ADAMS: Excuse me, your Honor. Could I just let the record reflect Your Honor's request that the documents which were returned to counsel for defendant today, which has been marked defendant's exhibit 2, is a sheaf of papers? They were not marked indivisually. Perhaps it would be wise if the reporter would mark

them defendant's exhibits 2 A,B,C,D, etc. And the record should also reflect that a copy of the deposition of Mr. Kleve, dated August 11, 1965, has been marked as defendant's exhibit No 3, and I would at this time like to move the admission of defendant's Exhibits Nos. 2 & 3 into the record at this time.

THE COURT: They will be received.

(Documents previously marked Exhibits 2A thru N, and No. 3 for identification, were received in evidence.(

MR. ADAMS: I suppose for the record I should make one further motion. I would suggest that I make this motion today, and I formally do it by motion memorandum to the Court with proper affidavits and set that matter for hearing. I don't think we need to take the Court's or counsel's time today, but I would like to move for a motion, an order, directing the plaintiff to pay costs of this action and reasonable attorney fees involved with this action. I think there is more than ample authority for such a proposition and I will be supplying the Court with a memorandum and proper supporting affidavits.

THE COURT: A dismissal with prejudice is at plaintiff's costs. As far as fees, that would be an ancillary matter.

MR. ADAMS: Did you say with, or without prejudice?

THE COURT: My constable advises me I had misused the term once, but I think the record should be clear that my dismissal is with prejudice.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

KARL KLEVE : NO 11578
Plaintiff-Appellant
vs : DECISION
RETAIL CREDIT COMPANY
Defendant-Appellee NOV 8 1971

Mr. James R. Rimedio, for Plaintiff-Appellant

Messrs. Frost & Jacobs, James R. Adams and Thomas P. Mehnert of counsel, for Defendant-Appellee.

PER CURIAM.

This cause came on for hearing upon the appeal on questions of law, assignments of error, transcript of the original papers from the Court of Common Pleas of Hamilton County, Ohio, the bill of exceptions, briefs and arguments of counsel.

The twelve claimed assignments of error are in the form of numbered paragraphs in the appelant's brief. In each of these numbered portions of his brief, appellant commingles assignment of error and argument. Specific assignments of error are not expressed. However, it does appear that the paragraphs in appellant's brief numbered one, two, three, four, five, seven, nine, ten, eleven and twelve all refer directly to his claim that the court erred in granting the appellee's motion to dismiss. The paragraphs numbered six and eight appear to be an attempt to present a form of alleged errors committed by the trial court in overruling the motion for new trial.

The paragraphs in appellant's brief relating to the motion for a new trial will be considered first.

The record discloses that the appellant's motion for a new trial filed Janu-

ary 6, 1971, was overruled by entry dated February 8, 1971. That entry does not give the trial court's reason for overruling the motion. Notice of appeal was timely filed.

When the motion for new trial was overruled, the appellant had fourteen days to file a motion for a new trial pursuant to the provisions of Rule 59 B of the civil rules of practice, as amended.

The appellant did not file a motion for a new trial until twenty-nine days after granting of the motion to dismiss.

The trial court did not give any reason for its action in overruling the motion for a new trial. It must be considered that the failure of the appellant to file the motion within the time provided by law was a basis for overruling the motion.

For the reasons given, alleged errors presented in paragraphs six and eight have no merit.

Coming on to consider the alleged errors presented in paragraphs numbered one, two, three, four, five, seven, nine, ten, eleven and twelve, in relation to the action of the trial court in granting the motion to dismiss, this Court finds there is no merit to those alleged errors for the same reasons given in determining the alleged errors in paragraphs six and eight.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas, Hamilton County, Ohio be, and the same hereby is, affirmed.

Counsel will present entry in accordance herewith.

HESS, P.J., YOUNG and SHANNON, J.J.

PLEASE NOTE:

Counsel must present an entry pursuant

to Rule 22, Rules of Appellate Procedure. If such entry is not submitted within the time specified in Rule 22, the Court will prepare and journalize an entry and the time for review will begin to run thereupon.

ENTRY OF ABOVE JUDGMENT was on 24 November, 1971

IN THE SUPREME COURT OF THE STATE OF OHIO

State of Ohio
City of Columbus

1972 Term
to wit 25 Feb 72

Karl Kleve
Appellant
vs
Retail Credit Co.
Appellee

No. 72-3
APPEAL from the COURT of APPEALS for HAMILTON COUNTY, OHIO.

This Cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court, sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this V

Witness my hand and the Seal of This Court this 7th March, 1972,

Thomas L. Startzman, Clerk

(SS) Sam F. Adkins, Deputy.

IN THE SUPREME COURT OF THE STATE OF OHIO

State of Ohio
City of Columbus

1972 Term

Karl Kleve
Appellant
vs
Retail Credit Co.
Appellee

No. 72-3

REHEARING

It is ordered by the Court that REHEARING in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the Seal of This Court this 7th March

Thomas L. Startzman, Clerk
(SS) Sam F. Adkins, Deputy.